In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their conviction under 18 U.S.C. 1382 for unlawfully entering a military base is invalid because they had no specific intent to commit the offense and because they were entitled to a jury trial.[1]

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[1] The Oklahoma Lawyers Guild has filed a "Motion for Leave to File Brief *Amicus Curiae*" and a brief in support thereof, in which it attempts to raise two further issues. Notwithstanding the Guild's contention that the intent of Rule 23(1)(c) of the Rules of this Court "is to prevent discussion of issues not briefed for the Court, not to prevent *amicus curiae* from briefing and arguing additional issues" (*Amicus* motion, p. 4), we submit that these issues are not properly before this Court. Rule 23(1)(c) indicates that the Court will consider only questions set forth in the petition or fairly comprised therein; it is thus entirely irrelevant to brief and to discuss other questions. Rule 42(3) is consistent with Rule 23(1)(c); the facts or questions of law to be discussed in the motion for leave to file a brief *amicus curiae* are those which are fairly comprised in the petition.

Following a non-jury trial in the United States District Court for the Western District of Oklahoma, petitioners were convicted of unlawfully entering a military base, in violation of 18 U.S.C. 1382. Four of the twelve petitioners were given suspended sentences and placed on probation for one year; six were sentenced to imprisonment for terms of four months; two were sentenced to prisn terms of six months and ordered to pay fines of $250 and $500, respectively. The court of appeals affirmed (Pet. App. 1a-14a).

On May 4, 1972, petitioners and 75 to 200 others gathered at Gate Two of Tinker Air Force Base in Oklahoma City, Oklahoma, to protest the war in Vietnam (Pet. App. 1a). The previous day the Base Commander, pursuant to Air Force Regulation 125-37, which authorized him to prescribe measures restricting entry onto the base, had promulgated Supplement 2 to the Base regulations.[2] This regulation lists the special categories of personnel identification to be recognized at the base gates and provides that visitors may be admitted only under specified procedures, which include the verification of the purpose of the visit by an appropriate person on the base (Pet. App. 3a).

In accordance with controls required for closed bases, a large warning sign was posted at the entrance to the base just north of Gate Two, which was visible to anyone attempting entry (see 50 U.S.C. 797(b)). The sign read:

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[2] Supplement 2 is reproduced in the petition (pp. 4-7).

WARNING
U.S. AIR FORCE BASE

IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE WHILE ON THIS INSTALLATION ALL PERSONNEL AND THE PROPERTY UNDER THEIR CONTROL ARE SUBJECT TO SEARCH

Petitioners were also warned that Tinker Air Force Base was a controlled entry installation by the presence of five security guards and a fence surrounding the base (Pet. App. 8a-9a).

Despite those warnings, a group of thirty or forty people crossed the "white line" signifying entrance to the base. Two officers, trying to restrain the group, explained the illegality of their entry. They were also met by Lt. Col. Malone, who read them the following statement (Pet. App. 2a):

> The installation commander, Col. John C. Holley, United States Air Force, denies you permission to enter this military installation or to be physically present on its property.
>
> You are trespassing on a military installation of the United States. By order of the installation commander you will immediately remove yourselves from this military installation. If you do not immediately comply, you will be arrested and prosecuted by the federal authorities. You are advised that pursuant to Title 18 U.S.C. 1382 "whoever, within the jurisdiction of the United States, goes upon any military, naval, or coast guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation * * * shall be fined not more than $500 or imprisoned not more than six months, or both."

One of the petitioners then read a statement to Col. Malone. When asked to leave, the group refused, sitting down in the middle of the street. They were thereupon arrested (Pet. App. 2a).

1. Petitioners contend (Pet. 9-12) that they did not have the requisite specific intent to violate 18 U.S.C. 1382, which provides for criminal punishment of "[w]hoever * * * goes upon any military * * * reservation * * * for any purpose prohibited by law or lawful regulation * * *." Both courts below, however, considered this issue and properly concluded that the record clearly established the element of specific intent.[3] While the warning sign near the gate did not reproduce Supplement 2 in its entirety, the sign, together with the fence and security guards, gave petitioners actual notice of the essential import of Supplement 2—that the base was closed and that it would be unlawful for them to enter without the commanding officer's permission. Once the substance of the prohibition was communicated, it was unnecessary to

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[3] Petitioners (Pet. 10-11) and the *amicus* (Br. 3-4) contend that this conclusion is inconsistent with the dictum in *Holdridge* v. *United States*, 282 F. 2d 302, 309 (C.A. 8), which affirmed convictions for violation of the second paragraph of Section 1382, prohibiting re-entry upon a military installation after orders not to return. In distinguishing the first paragraph, involved in this case, the court noted that "motive to some extent at least is an element of the offense there defined. Purpose and the prohibition must both be proved. This interpretation affords some protection to the innocent trespasser." But petitioners were hardly innocent trespassers. The evidence showed that they had ample notice that they were prohibited from entering the base, and that they nevertheless entered, with the obvious purpose of disobeying the prohibition. Contrary to the suggestion in the *amicus* brief (pp. 3-4), the district court at trial clearly recognized the necessity for a finding of specific intent (Tr. 279, 285-286).

quote or cite the regulation. See *Lambert* v. *California*, 355 U.S. 225, 227. As the court of appeals observed (Pet. App. 9a-10a) in an opinion on which we principally rely:

> We agree with the District Court which stated: "It is not significant or prejudicial to the Defendants that the Information describes the regulation as one prohibiting the entry upon the military reservation 'without the consent or permission of the Commanding Officer,' rather than 'without proper identification.' Such language is merely descriptive of the regulations, which speaks for itself. The important fact is that the regulation prohibited entry to certain persons. It becomes a matter of proof as to whether the Defendants were such persons and intended to enter the base knowing that they were so prohibited."

In view of the various circumstances indicating the unlawfulness of their entry (see Pet. App. 11a-12a), proof of specific intent was more than sufficient.

Petitioners also contend that, rather than intending to violate a lawful regulation, their purpose in entering the base was to exercise First Amendment rights. The fact that the main purpose of their entry was to protest the war in Vietnam does not, of course, negate the existence of a specific intent to violate Supplement 2. Moreover, as the trial judge observed (Order Denying Motion to Dismiss Indictment, Pet. App. 27a), petitioners did not brief their First Amendment claim in the district court. Nor was it raised in their brief in the court of appeals. Thus, this Court need not consider it. See *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the commanding officer of a closed base has

very extensive power to exclude persons from entry in the interest of order and security. See *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy*, 367 U.S. 886; *McQueary* v. *Laird*, 449 F. 2d 608 (C.A. 10); *Weissman* v. *United States*, 387 F. 2d 271 (C.A. 10). *Flower* v. *United States*, 407 U.S. 197, on which petitioners rely, involved the peaceful distribution of leaflets by a single person, which took place not on a restricted area of a base but on a street open to the public.[4] There was, in short, no violation of First Amendment rights in this case.

2. Petitioners also claim that, although charged with a petty offense, they were entitled to a jury trial in the district court, since "Congress, however, has not expressly provided otherwise" (Pet. 14-16). This contention is thoroughly answered in the district court's opinion

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[4] Petitioners suggest that the commanding officer could not prohibit their entry except to prevent threatened disruptive conduct (Pet. 13-14). Their reliance on *Kiiskila* v. *Nichols*, 433 F. 2d 745, 751 (C.A. 7), is misplaced. In that case an employee of the base was excluded, without prior warning, because she had demonstrated against the war near, but not on, a naval base and had invited an officer of the base to a rally. The court noted that the military did not even allege the violation of a post regulation. It refused to infer from the employee's conduct off base that she would engage in similar, and "presumably unprotected," activity on base (433 F. 2d at 751). In *United States* v. *Bradley*, 418 F. 2d 688 (C.A. 4), on which petitioners also rely, the court held that distribution of leaflets on a military post by two students was not prohibited by a post regulation applicable only to larger, more obstructive demonstrations. In contrast to the instant case, the defendants in *Bradley* were carrying out their activity on a completely unrestricted portion of the base.

denying the motion for a jury trial (Pet. App. 15a-24a),[5] and we rely on that opinion here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5] See also the discussion in the court of appeals opinion (Pet. App. 4a-5a).

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